Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	**CS Docket No. 96-46**
	)	
	)	

COMMENTS OF CBS INC.

Mark W. Johnson
1634 I Street, N.W.
Suite 1000
Washington, DC 20006
(202) 457-4513

Stephen A. Hildebrandt
1025 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 857-5155

Its Attorneys

April 1, 1996

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	

COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, respectfully submits these comments in response to the Notice of Proposed Rulemaking ("Notice") in the above proceeding, which seeks comments "on how the Commission should implement the requirements of the open video system framework in a way that will promote Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[1]

I. Introduction And Summary.

The Telecommunications Act of 1996 (the "Act") explicitly allows telephone companies to enter the video marketplace in several ways, using any of the familiar

[1] Notice at ¶4, citing Telecommunications Act of 1996 Conference Report, S. Rep. 104-230, at 172, 177-78 (February 1, 1996) ("Conference Report").

regulatory frameworks embodied in the Communications Act -- radio regulation under Title III, common carrier regulation under Title II, and cable regulation under Title VI.[2] In addition, Congress provided a new alternative regulatory scheme for telco entry into delivery of cable-like video services -- the "open video system" -- which was intended to "encourage common carriers to ... introduce vigorous competition in entertainment and information markets"[3] in the near term. CBS strongly supports the goal of new competition in these markets and believes that the open video system proposal is a promising concept to help bring it about expeditiously. In these Comments, we will briefly discuss two implementation issues that are of special importance to broadcast television networks and local stations -- signal carriage regulation and the maintenance of unimpaired access by television broadcasters to their mass audiences.

While the Act provides for open video systems ("OVS") to be free from some elements of cable regulation, such as franchise requirements and rate regulation, which might especially inhibit early competitive entry by telephone companies into the video marketplace, it specifically does not relieve them from other elements of Title VI and from other Commission regulations. Indeed, the Act specifically directs the Commission to effectuate Congress's clear intent that statutory provisions and existing rules governing cable retransmission of broadcast signals should be applied effectively to open video

---

[2] Communications Act of 1934 §651(a) ("Communications Act")..

[3] Conference Report at 178.

systems.[4] We offer below our views on some of the specific signal carriage issues raised in the Notice.

Our second implementation concern relates to the ability of over-the-air broadcast audiences to continue to have as convenient access to broadcast channels in the environment of an open video system as they now have over-the-air or in the environment of a typical cable system. Appropriate adaptation of the cable must-carry rules, including their channel positioning component, to open video systems will go a long way toward this result. However, open video systems -- especially as they evolve to interactive capability -- will raise special issues of favoritism and viewer confusion. While the Act does generally forbid discrimination by an open video system operator in the provision of information to subscribers related to the programming services offered over the system[5], the Commission is faced with defining and preventing "discrimination" without the tools of common carrier regulation which have long applied to the telephone companies in their traditional businesses.[6] As discussed below, we believe that regulatory vigilance will be required to deal with the potential and incentive for such favoritism which will exist with

---

[4] Communications Act §653(b)(1)(D); *Id.* §653(c)(1)B).

[5] Communications Act §653(b)(1)(E).

[6] "With respect to the establishment and operation of an open video system, the requirements of [Section 653] shall apply in lieu of, and not in addition to, the requirements of title II." Communications Act §653(c)(3); *see also* Conference Report at 178 ("The conferees do not intend that the Commission impose title-II like regulation under the authority of this section.")

respect to program packages and interactive services in which open video system operators have a financial interest.

II. The Commission Should Apply Its Sports Exclusivity, Network Nonduplication And Syndicated Exclusivity Rules To Open Video Systems In A Way That Is Simple, Efficient And Fulfills The Purpose Of The Rules.

The Act requires the Commission to "extend to the distribution of video programming over open video systems" its sports exclusivity, network nonduplication and syndicated exclusivity rules.[7] The Act's mandate is unqualified, and the Congressional intent that these rules must apply with full force in the open video system context is unambiguous.[8] Under these circumstances, the Commission should limit itself to designing an implementation scheme that is simple, efficient and provides complete protection to the program rights that are intended to be covered by the rules.

The Notice asks how these rules "would be applied to an open video system whose service territory cross [sic] multiple community units or relevant geographic zones." Notice at ¶46. An open video system which serves multiple geographic zones is not unlike a large cable operator which serves numerous contiguous communities through

---

[7] Communications Act §653(b)(1)(D).

[8] These rules have been imposed on cable systems under the Commission's ancillary jurisdiction under Title III of the Communications Act, and have been based on the Commission's general mandate to assure that the viability of the local broadcasting system is preserved. *See* Amendment of Parts 73 and 76 of the Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299, 5311 (1988).

multiple headends. The obligation of such a cable operator is clear -- it must install the necessary and appropriate equipment to allow it to provide sports exclusivity, network nonduplication and syndicated exclusivity protection to local television stations, even if the configuration of the system makes compliance somewhat more complicated or expensive. It is equally clear that the obligation of open video systems providers under the Act is not dependent on the ease with which compliance can be accomplished. Indeed, by specifically applying these rules to open video systems without qualification, Congress appropriately recognized that protection of negotiated exclusivity rights in a television market is an essential requirement for maintaining the economic viability of our unique, locally based television broadcast system.

The Notice asks whether "an open video system operator, the individual video programming providers, or some other entity" should be responsible for enforcing the local stations' rights under these rules and for blocking the violative programming. Notice at ¶46. CBS believes that the notifications that are required under the current rules (i.e., to the cable system) should be made to the open video system operator, even where the affected programming is being offered by a program provider not affiliated with that operator. A mechanism for communicating and implementing those notifications could be developed as part of the ongoing relationship between an open video system operator and its programmer-customers. While the program provider may be the closest equivalent to

a "cable system" for the purpose of the rules in question[9], the assumption by the open video system operator of some of the burden of implementation is not unreasonable and would be the most efficient and simple solution, especially since it is the OVS operator who will control the technical facilities and have the physical ability to block the offending signal in whatever geographic area is required by the law.[10].

III. The Commission Should Follow The Clear Congressional Intent That The Must-Carry And Retransmission Consent Regulatory Schemes Should Be Applied Intact To Open Video Systems.

The Notice asks for comment "on the overall applicability of must-carry and retransmission consent in the context of open video systems." Notice at ¶59. At the outset, we note again that the Act's mandate is clear. That is, the Commission is required, "to the extent possible, to impose obligations that are no greater or lesser than" the current provisions of the Communications Act relating to retransmission consent and cable systems' obligation to carry local commercial broadcast stations.[11]

---

[9] §653(c)(4) provides that "[n]othing in this Act precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of Title 17, United States Code." It is the operation of the compulsory copyright license of section 111 that precludes a marketplace solution to the signal carriage issues that underlie the sports exclusivity, network nonduplication and syndicated exclusivity rules.

[10] Naturally, the OVS operator would also be the appropriate party to receive the initial notification and implement the program blocking when a broadcast station whose programming is to be blocked is carried on a "shared channel" which is included in packages offered by more than one program provider. (Notice at ¶46)

[11] Section 614 of Title VI of the Communications Act creates cable operators' " must-carry" obligations regarding commercial television stations, and Section 325 of

With regard to retransmission consent, CBS believes that Section 325 clearly applies by its terms to all programming providers on an open video system, including those unaffiliated with the system operator. That is, all such programming providers are without a doubt "multichannel video program distributors" for the purposes of Section 325.[12] However, the Commission should make clear in its order implementing its regulatory scheme for open video systems that the Act's provision generally preventing an open video system operator "from discriminating among video programming providers with regard to carriage on its open video system"[13] is not a constraint on the negotiations between broadcasters and the operator. That is, in order for the retransmission consent rights embodied in Section 325 to be effectuated in the context of open video systems, a broadcast station must be able to negotiate not just for compensation, but also for such non-cash consideration as system carriage of other program services offered by the broadcast station.

This view is consistent with the Commission's tentative conclusion that "some level of rate 'discrimination' would be acceptable, provided that the justification for the

---

Title III generally requires the "retransmission consent" of a broadcast station before its signal can be carried by a cable system or other multichannel video programming distributor.

[12] In its original order implementing Section 325, the Commission noted that "multichannel video programming distributors" included all program providers on video dialtone systems. In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 2998 (1993).

[13] Communications Act §653(b)(1)(A).

discrimination was not unjust or unreasonable." Notice at ¶32. In this case, this treatment of retransmission consent stations would simply recognize the realities of the marketplace which governed the initial round of retransmission negotiations following the enactment of the 1992 Cable Act. In those negotiations, many cable operators agreed, for example, to carry a cable channel affiliated with a broadcast station owner in consideration for the right to carry the broadcast station's signal. The mandate of the Telecommunications Act of 1996 to apply the retransmission consent statutory scheme to open video systems "to the extent possible" can only be interpreted as contemplating similar negotiating flexibility in the OVS context.

In its adaptation of the must-carry rules to open video systems, the Commission should once again start from the premise that Congress intended that their full purpose and effect should be preserved. That purpose, at bottom, is to ensure that free, over-the-air broadcasters are not inhibited or prevented by their video distribution competitors (originally, cable systems, but now including telephone companies) from reaching the mass audience on which they depend. The cable must-carry statutory and regulatory scheme fulfills that purpose not just by a bare requirement that local broadcast stations be carried at the stations' option, but also by meaningful provisions directly relating to the ease with which audiences are able to access those stations. Those provisions include channel positioning options for broadcasters, as well as prohibitions on degrading the technical

quality of the broadcast signal and on altering its content.[14] Most fundamentally, "must-carry" signals "shall be provided to every subscriber of a cable system."[15]

In this regard, the Notice asks "whether and how open video systems operators should ensure that every subscriber can receive the must-carry channels." Notice at ¶59. For example, "if a subscriber purchases a programming package that is not affiliated with the operator, is the operator still responsible for ensuring that the subscriber receives the must-carry channels?" Id. The answer in the current cable system context is that a cable operator must supply to all of its subscribers a "basic tier" which includes the local broadcast channels.[16] This statutory requirement is contained in the section of the 1992 Cable Act that pertains to rate regulation and, as such, has not been applied to open video systems under the Act. CBS believes, however, that the Commission is free to adopt its own "basic tier" concept that is not tied to rate regulation, but is designed simply as a tool for effectively implementing the must-carry obligation that, by its terms, runs to the open video system operator under §653(c)(1). Since, as noted above, that obligation

---

[14] Sections 614(b)(4) and (b)(5).

[15] Section 614(b)(7).

[16] Section 623(b)(7)(A). All of these obligations are based on extensive Congressional findings about their importance to the viability of free, over-the-air broadcasting when the time "must-carry" obligations were enacted in the Cable Television Consumer Protection and Competition Act of 1992. Pub. L. No. 102-385, §§2(a) (The "1992 Cable Act"). Prior to the 1992 Cable Act, the Commission's must-carry rules were based on its ancillary jurisdiction under Title III of the Communications Act.

specifically includes the responsibility to provide must-carry signals to every subscriber, the OVS operator should be required to group them together on a "basic tier" and assure that all such signals are included with, and seamlessly integrated into, all combinations of program packages that are offered to subscribers.

Finally, the Notice asks "how must-carry and retransmission consent stations should be defined for open video systems that span multiple television markets." (Notice at ¶60.) We noted above that retransmission consent rights are not limited to "local" stations and unquestionably are applicable to all multichannel program providers on an open video system, so that no special implementation problems are presented. With regard to must-carry stations, CBS believes that the obligations of an open video system operator should presumptively be no different from those of a cable operator today.

Where a cable system serves counties in different ADI's, all qualified "must-carry" stations in both ADI's must be carried unless the cable system has the technical capability to offer different broadcast channel lineups in different ADI's. There is no reason to treat OVS operators differently, especially in light of the Act's mandate to adopt regulations that are "no greater or lesser than those imposed on cable operators." In CBS's view, the Commission need not speculate now on whether the operation of the must-carry rules present could eventually create an undue burden on a region-wide open video system, for

Commission to try to develop a regulatory scheme that anticipates hypothetical marketplace outcomes. Rather, the Commission should focus in this initial proceeding on ensuring that the bedrock protections for local broadcast stations are put in place. Exceptions to those protections in particular circumstances can and should be dealt with in rulemaking or waiver proceedings as the circumstances arise.

IV. The Commission Should Implement The Act's Provisions Related To Information Provided To Subscribers By Open Video System Operators In A Way That Ensures That The Public Continues To Have Convenient Access To Local Broadcast Stations.

The Notice asks for "comments on how to interpret and implement the various provisions of subsection 653(b)(1)(E), which seek to prevent discrimination in favor of an open video system operator or its affiliates with regard to information (or the way information) is provided to subscribers for selecting programming on open video systems." Notice at ¶48. CBS believes that the general purpose of these provisions is to prevent a telephone company from exercising the market advantage vis-a-vis nonaffiliated program providers -- including broadcasters -- that it will have because of its direct relationship with its subscribers as the open video system operator.

As in the must-carry context, CBS suggests that it is neither necessary nor possible now for the Commission to anticipate every situation in which this discrimination could occur. However, in adopting its initial regulatory framework, the Commission should keep in mind the competitive dangers that its clear mandate under the Act is intended to

meet. In that regard, the Commission should recognize that local broadcasters are uniquely and entirely dependent on their ability to reach a mass audience, while their subscription-based competitors are not. Further, broadcasters are as a practical matter dependent on those same subscription-based competitors for their distribution to wired households.

§653(b)(1)(E)(i) states the general proposition that the Commission must "prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers." In response to a question posed in the Notice, CBS believes that the plain meaning of this broad statutory prohibition unquestionably encompasses "programming guides (electronic or paper)"[17] and the way that such guides and other navigation devices and menus present information to subscribers. Indeed, CBS believes that the terms "material and information" should be considered for now to be unqualified. Any necessary refinements to the scope of the subsection can await marketplace developments which shed some light on the business practices of operating open video systems.

[17] Notice at ¶48 .

In CBS's view, "unreasonable discrimination" against broadcast station signals should presumptively include any activity by an open video system operator which has the effect of making it more difficult for broadcast viewers to identify and locate broadcast channels available on the system. Such activity would include default program menus that affirmatively favor program services affiliated with the system operator or disfavor television broadcast stations.[18] It would also include program guides or other navigational aids that fail adequately to identify the program service offered by nonaffiliated programmers, like broadcast television networks.[19] Once these basic protections are in place, further refinement of the definition of "unreasonable discrimination" can be deferred until marketplace experience is gained.

V. Conclusion.

The Commission should be guided in this proceeding by the Congress's clear statement of its intent to apply cable signal carriage statutory requirements and rules to open video systems in a way that gives full effect to those requirements in the OVS context. The Commission should also assure that broadcasters' indispensable

---

[18] §653(b)(1)(E)(iv) specifically prohibits in the first instance "an operator of an open video system from omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide or menu." (Emphasis supplied). The non-discrimination provision of §653(b)(1)(E)(I), of course, is in addition to this threshold obligation.

[19] §653(b)(1)(E)(ii) and (iii) create specific obligations on open video system providers to ensure that all program providers and copyright holders can effectively identify their program services to subscribers.

straightforward and convenient access to their mass audiences is unimpaired by OVS "navigation" mechanisms that complicate such access or by other forms of discriminatory treatment.

Respectfully submitted,

CBS Inc.

By _____

Mark W. Johnson
1634 I Street, N.W.
Suite 1000
Washington, DC 20006
(202) 457-4513

By _____

Stephen A. Hildebrandt
1025 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 857-5155

April 1, 1996

Its Attorneys